

only 251,790 lines to competition (a mere 1.5% of the total market).<sup>30</sup> At the same time, SBC's fourth quarter 1997 earnings rose 22%, as the company added phone lines and wireless customers.<sup>31</sup> SBC also claimed that it had begun to cut costs since its acquisition of the Pacific Telesis Group. Annual line growth at Pacific Bell is currently estimated at 500,000 lines per year.<sup>32</sup> Thus, Pacific Bell's loss to competition is way behind the BOC's line growth. Therefore, Pacific Bell continues to mislead state commissions and the FCC with claims that it is being hurt in the marketplace when in fact it continues to grow.

### **Consistent Legal Delays**

Rather than expending so much time and effort — including that of its would-be competitors who must ensure that the Commission has a full picture of the lack of momentum in local competition — in trying to circumvent the requirements of the Act, the SBC LECs should devote themselves to meeting their statutory “obligations” and getting their own houses in order before taxing the Commission's limited resources with another paper-intensive proceeding that will do little to advance base-line local competition. ICG is concerned that given the SBC LECs' consistent inability to meet the requirements of Section 251, whether intentional or not, the Commission should not permit the SBC LECs to divert their energy, capital, and other resources to new projects,

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<sup>30</sup> “Pacific Bell Wants Into Long Distance in State by August,” San Francisco Chronicle, January 30, 1998.

<sup>31</sup> “SBC Communications Earnings Climb 22%,” San Francisco Examiner, January 29, 1998.

<sup>32</sup> “Pacific Bell Wants Into Long Distance in State by August,” San Francisco Chronicle, January 30, 1998.

such as those outlined in its petition. The SBC LECs are simply using their petition for “relief” as an excuse to begin shifting attention away from their obligations under Section 251, just as local competition struggles to take root, to issues that are more consistent with SBC LECs’ self interest and far less significant to the creation of a competitive telecommunications marketplace that will benefit all Americans.<sup>33</sup>

Pacific Bell and the other SBC LECs will undoubtedly contend that they cannot be penalized for asserting legal rights, but ICG’s concern is that the assertion of these rights, whether appropriate or not, impacts how local competition develops. The objective result of asserting every conceivable legal right, as all of the SBC LECs are well aware, is to slow the development of local competition to a snail’s pace, at best.

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As shown above, ICG’s experiences with Pacific Bell and Southwestern Bell demonstrate that the SBC LECs have a long way to go before they can legitimately claim to have complied with the Section 251 and 252 mandates of the Act. For this reason, it would be inconsistent with public policy for the Commission to consider SBC LECs’ request for relief at this time.

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<sup>33</sup> Competitors of the SBC LECs must also devote substantial capital, in addition to their energy and other resources, to participate in these proceedings, instead of investing in their networks in a way that will keep the development of local competition on schedule.

## **II. THE SBC LECs' PETITION FAILS TO ADDRESS A WIDE VARIETY OF CONCERNS ABOUT THEIR PROPOSAL**

As ICG noted at the outset, it associates itself with the comments of other parties that make legal and policy arguments about why it is inappropriate to grant the SBC LECs the relief they request. Thus, ICG does not attempt to highlight every conceivable issue that the SBC LECs have failed to address in their petition. However, ICG would like to focus the Commission's attention on a number of aspects of the petition that are of particular concern at the present time, when local competition is still taking root.

Of foremost concern, is the discussion by the SBC LECs of all of the services that they would like to provide to their customers, if only the Commission would grant the relief the SBC LECs request. It seems likely from the SBC LECs' pleading that the SBC LECs are currently in the position, or very soon will be, to offer to their customers all of the ADSL services they discuss. Although the SBC LECs have not gone so far as to state that such services could be provided "now," and will doubtlessly argue that a number of "technical considerations" need to be worked out, it appears that the "relief" the SBC LECs seek is simply the insulation of services from the requirements of Sections 251 and 252 competitors before the SBC LECs take the final steps to bring their ADSL services to the marketplace. The SBC LECs are also inexplicably vague in describing how and to what extent the ADSL facilities will be available to competitors.

The Commission must be vigilant in ensuring that local competition comes to fruition, rather than being taken in by the false need to provide "cover" for incumbent LECs just when those incumbent LECs are being forced to compete against less-

established, start-up CLECs. Therefore, the Commission should not consider the *quid pro quo* that the SBC LECs' petition appears to offer: provision of ADSL services in exchange for an exemption for those services from local competition obligations. There is no reason at all for the Commission to consider such a trade-off, particularly when there is no shortage in the availability of data services in the SBC LECs' regions. A number of CLECs, including ICG, are already providing services, or soon will provide, similar to those the SBC LECs' want to provide under a special regulatory arrangement. The presence of these competitively-provided data services in the SBC LECs' backyard that will incent them to make ADSL services available without the need for any special treatment by the Commission.

In addition, there are a number of issues arising under the SBC LECs' proposal for which they have given an inadequate, or at least an abbreviated, explanation. First, the SBC LECs describe a three-step process for checking the ADSL capability of a local loop for the purpose of providing ADSL-capable unbundled loops to competitors on a non-discriminatory basis. The SBC LECs state that the third step, which they label the "spectrum management" step "will be deployed in the near future," but provide no further details. Certainly, the Commission has every reason to demand that such a process, which is a prerequisite to nondiscriminatory access, be up and running before the Commission even considers the requested relief, especially given the SBC LECs' history of intransigence about the particulars of local competitive issues and the SBC LECs' vagueness about those issues in their petition.

Second, in describing their “fast-packet” network in shorthand terms, the SBC LECs fail to address for competing providers the all-important issue of interconnection. For example, will the SBC LECs offer interconnection between their fast-packet network and the similar networks of other providers? At the very least, the SBC LECs should commit to interconnecting with other providers on a peer basis.

Third, while the SBC LECs seek an exception from having to unbundle and discount ADSL services, they are less clear on whether they seek to have the digital subscriber line multiplexer (“DSLAM” – the ADSL equipment located in the LEC central office) exempt from unbundling. The SBC LECs state that “the technical feasibility of unbundling the current generation of DSLAMs is not clear ...”<sup>34</sup> While ICG contends that the DSLAM is to be treated as a UNE and offered as such to CLECs, the treatment of the DSLAM involves highly complex issues that would be inappropriate for the Commission to resolve in this proceeding, as the SBC LECs may be suggesting. In no case, however, should the Commission make a determination that the DSLAM is not a UNE, or otherwise exempt the DSLAM from unbundling, without exploring the issue in a separate proceeding with a complete record.

Fourth, the SBC LECs request “relief” that would allow them to resell ADSL services at the full retail price, *i.e.*, without any discounts whatsoever. Yet, the SBC LECs never address the reason why they should be able to avoid discounting these services, presumable when these are avoided costs for SBC.

ICG contends that the issues arising under the SBC LECs' petition, as well as those Section 706 petitions filed by three other RBOCs, present policy choices to the FCC that are so important to the future of local competition that the Commission must resist any pressure to move forward without having had an opportunity to fully explore these policy choices. Instead, the Commission must proceed only after it has developed a complete record through a full notice-and-comment proceeding and has investigated the matter further. To this end, should the Commission elect to examine the issues at all, it can take up the four RBOC Section 706 petitions in conjunction with its August 1998 inquiry pursuant to Section 706.

### **III. THE SBC LECs HAVE NOT SHOWN A BASIS FOR GRANTING THEM RELIEF**

The SBC LECs' petition for relief is essentially a request for waiver of particular rules in an individual-case situation. ICG maintains, as outlined below, that the SBC LECs have not made the requisite showing for the grant of such a waiver. Nor have the SBC LECs come close to making a case that is compelling enough to warrant forbearing from imposing regulatory restrictions across the entire industry, which is what "forbearance" would accomplish.

As the foregoing "laundry list" illustrates, the would-be competitors of Pacific Bell and the other SBC LECs have faced considerable obstacles in trying to do business with the

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<sup>34</sup> It is worth noting that SBC makes no attempt to comply with the statutory requirement that an element must be offered unless it is technically unfeasible.

RBOC, despite the fact that ICG and others seek to do only what the Act entitles them to do: interconnect with the SBC LECs' network in a way that will allow them to compete. Whatever air of cooperation an SBC LEC may foster on occasion is largely undercut by inaction or their outright refusal to act on the particulars of interconnection.

To receive the waiver of the statutory requirements and Commission rules that they seek, the SBC LECs must demonstrate good cause for the grant of such relief.<sup>35</sup> The Commission has found good cause to consist of two factors: (1) the underlying purpose of the rule will not be served, or would be frustrated by application in a particular case; and (2) the unique facts and circumstances of a particular case *render application of the rule inequitable*, unduly burdensome, or otherwise contrary to the public interest.<sup>36</sup> There can be no question but that denial of the waiver is consistent with the Congressional purpose in requiring compliance with Section 251. As for the second factor, the Commission can consider equities to a particular party in deciding whether to grant a waiver.<sup>37</sup> In its evaluation of special circumstances in a particular instance, the Commission may look to considerations of equity. In their petition, the SBC LECs have advanced no affirmative

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<sup>35</sup> If the Commission were to treat SBC LECs' petition as one requesting "forbearance" of imposing certain regulatory restrictions under Section 251 and 252 of the Act, it is clear the petition would have to be denied. The SBC LECs have not made a showing that would warrant the Commission's forbearance (under Section 10 of the Act) from imposing certain restrictions for all parties implicated by Section 251 and 252, which would be the consequence of forbearance. Nor can the requisite showing be made by incorporating similar petitions filed by other interested parties.

<sup>36</sup> See 47 C.F.R. § 22.19(a)(i)-(ii).

<sup>37</sup> See Telerama, Inc. v. FCC, 419 F. 2d 1047 (6<sup>th</sup> Cir. 1969); United Television Co. v. FCC, 514 F. 2d 279, 282 (D.C. Cir. 1975).

equitable grounds upon which grant of a waiver would be appropriate. Nor have they shown that a denial of relief would be inequitable.<sup>38</sup>

It is on equitable grounds, in particular, that the SBC LECs have not only failed to carry their burden of demonstrating compliance with Section 251, but do not appear to have tried to comply fully, given the evidence outlined above. As a result, the SBC LECs need to be sent back to work with a message that the Commission and SBC's would-be competitors wait to see, albeit with increasingly less patience, the tangible results of a commitment to local competition,<sup>39</sup> as mandated by the Act.

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As discussed above, the Commission must continue to marshal its resources to ensure that the RBOCs take all of the steps required by Section 251 to make local competition a reality, not just an aspiration. ICG's experiences with the SBC LECs richly demonstrate the necessity of the Commission keeping a vigilant eye on what transpires at ground zero in all of the SBC LECs' regions, as well poking and prodding the RBOC along the way. Section 271 provides much of the prod, and so does allowing the RBOCs to pursue their profit-maximizing agendas, and neither should be tossed aside for *any*

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<sup>38</sup> Here, grant of the SBC LECs' petition would be inequitable to the parties who have complied with the provisions of Section 251, while the SBC LECs have not. "[F]undamental fairness to those who comply with the provisions of this rule mandates stringent compliance." Florida Cellular Mobil Communications Corp. v. FCC, 28 F. 3d 191, 198 (D.C. Cir. 1994).


<sup>39</sup> See Investigation of Southwestern Bell Telephone Company's Entry Into The Texas Inter-LATA Telecommunications Market, PUC Project No. 16251, Commission Recommendation (May 1998).



“relief,” no matter how “targeted and limited,” particularly in the absence of a showing of unmet needs. Therefore, because the SBC LECs have not made a showing that they are complying with the requirements of the Act, particularly in the face of contrary evidence submitted by ICG, the Commission should deny the relief sought by the SBC LECs in their petition.

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Dated: June 24, 1998

**CERTIFICATE OF SERVICE**

I hereby certify that on June 24, 1998, a copy of the foregoing Comments of the ICG Telecom Group, Inc. was sent by first class United States mail, postage prepaid, to the following:

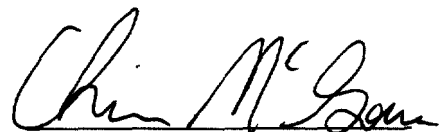
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